APPENDIX

RELIGION AND POLITICS

The Intentions of the Authors of the First Amendment

MICHAEL J. MALBIN

American Enterprise Institute for Public Policy Research
Washington, D.C.

1978

CONTENTS

		Book Page	App. Page
PREFACE			
1	THE ESTABLISHMENT CLAUSE	1	[3a]
	Amendments Proposed	3	[6a]
	The August 15 Debate	6	[10a]
	The August 20 Reconsideration	11	[17a]
	Senate Action	12	[18a]
	The Meaning of the Final Language	13	[20a]

[The following sections of the treatise were not reprinted in the Appendix. The page numbers refer to the original treatise.]

2	THE FREE EXERCISE CLAUSE	19
	The Virginia Example	19
	The 1776 Virginia Declaration of Rights	20
	Between 1776 and 1784	22
	General Assessment Bill of 1784	23
	Madison on Religious Freedom	25
	Madison and Jefferson Compared	27
	Jefferson and Locke	29
	Locke on Toleration	29
	Locke and Jefferson on Religious Opinions	33
	Free Exercise in the Bill of Rights	36
3	CONCLUSION	39

1 THE ESTABLISHMENT CLAUSE

A great deal has been written about the original meaning of the establishment of religion clause, much more than has been written about free exercise. But for all of this writing, nobody has tried to interpret the debates in the First Congress on a speech-by-speech basis.

One reason for this reluctance to look into the legislative history has to do with the sources available to the scholar. It always has been known that the *Annals of Congress*, by far the most complete records of the debate available, is taken from the shorthand notes of a reporter, Thomas Lloyd, who compiled them for private sale. Because there were no verbatim or official notes of those early congressional debates, most historians have been reluctant to lean too heavily on them for their interpretations.

Recent archival work has made it possible for the student of the religion clauses to use the *Annals* with much greater confidence than might have been felt in the past. The First Congress Project at George Washington University, sponsored by the National Archives, has been collecting a massive amount of material in preparation for what it expects to be the definitive multivolume documentary history of the First Congress.[1] While the same cannot be said for all of the clauses in the Bill of Rights, nothing collected by the First Congress Project suggests any reason for dissatisfaction with the *Annals* on the religion clauses. Lloyd may not have recorded every word of every speech, but at no point do the other

---

[1] The project director is Professor Linda Grant DePauw. The first of a projected seventeen volumes was: *Documentary History of the First Federal Congress of the United States of America, Vol. 1: Senate Legislative Journal* (Baltimore and London: Johns Hopkins University Press, 1972). I should like to thank the project's two assistant editors, Charlene B. Bickford and Lavonne M. Hoffman, for their assistance.

accounts of the debates add new information to the *Annals* or alter what was in them.

Lloyd's notes tell us that the members of the First Congress did not intend the establishment clause to mean anything remotely resembling what the Supreme Court has been saying it means, at least since 1947. Some of the justices in recent years appear to have recognized that the Court's rulings have not been based on a proper reading of 1789 history.[2] But the justices have not replaced the earlier misreadings of history with an alternative interpretation. Instead, they have been acting almost as if their recognition of their predecessors' historical errors have liberated them from the need to consider what purposes the members of the First Congress may have meant the religion clauses to serve.

The turning point in the recent history of the establishment clause was the 1947 parochial school busing case of *Everson* v. *Board of Education*.[3] In the opinion written for the Court by Hugo Black, the Court announced a rule of law, endorsed by dissenters as well as by the five-justice majority:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[4]

---

[2] See, for example, Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L.ed.2d 697 (1970), where Chief Justice Burger refers favorably to C. J. Antieau, A. T. Downey, and E. G. Roberts, *Freedom from Federal Establishment: Formation and History of the First Amendment Religion Clauses* (Milwaukee: Bruce, 1964), p. 6, note 9, without adopting their affirmative thesis.

[3] 330 U.S. 1, 67 S. Ct. 504, 91 L.ed. 711 (1947).

[4] 330 U.S. 1, 15.

There were two key elements in this rule. (1) The Court said that Congress cannot give nondiscriminatory aid to religion. There never was any question that the clause prohibited Congress from preferring one religion or group of religions over another, but this was the first time the Supreme Court took the additional step of prohibiting non-preferential aid to religion as such. (2) The other key element in the *Everson* rule was its effect on the states. For the first time, the Court said that whatever Congress could not do, the states could not do either.

The *Everson* Court claimed that it based its reading of the establishment clause on the intentions of the people in the First Congress.[5] Later, the Court led by Chief Justice Earl Warren reiterated this historical assertion in opinions endorsing the *Everson* rule.[6] While a number of legal scholars have supported *Everson's* reading of history,[7] the reading has not gone unchallenged. An impressive number of scholars has written in opposition to either the no-aid rule[8] or the extension of the establish-

---

[5] 330 U.S. 1, 13.

[6] McGowan v. Maryland, 366 U.S. 420, 440-41, 81 S. Ct. 1101, 6 L.ed.2d 393 (1961); Engel v. Vitale, 370 U.S. 421, 425, 82 S. Ct. 1261, 8 L.ed.2d 601 (1962); Abington School District v. Schempp, 374 U.S. 203, 213-14, 83 S. Ct. 1560, 10 L.ed.2d 844 (1963).

[7] Robert G. Dixon, "Religion, Schools and the Open Society," 13 *Journal of Public Law* 267, 278 (1964); Leonard Levy, *Judgments: Essays on American Constitutional History* (New York: Quadrangle, 1972) and "School Prayers and the Founding Fathers," *Commentary*, vol. 34 (September 1962), p. 225; Leo Pfeffer, "The Case for Separation," in J. Cogley, ed., *Religion in America: Original Essays on Religion in a Free Society* (New York: Meridian, 1968), pp. 57-73.

[8] Antieau, Downey, and Roberts, *Freedom from Federal Establishment*; Edward S. Corwin, "The Supreme Court as a National School Board," 14 *Law and Contemporary Problems* 3 (1949); Lowenthal, "The Place of Religion in American Public Life: A Critique of Absolute Separatism" (Uupublished, 1969); Edward R. Norman, *The Conscience of State in North America* (London:

ment clause to the states,[9] but none has tried to interpret Lloyd's notes on a speech-by-speech basis. When we look at these notes carefully, we find that not one, but both, halves of the *Everson* rule fly in the face of the intended meaning of the establishment clause.

Amendments Proposed

The Constitution, as ratified, mentioned religion only once—in the Article VI clause prohibiting religious tests for national office. The delegates at the Philadelphia Convention thought that, since they were creating a government of limited powers, with no authority to act in matters relating to religion, no further protection was necessary. An extended, commercial republic, made up of people of all faiths, would never let the government impose a religious orthodoxy, as long as all kinds of people could be represented in the legislature.

This argument was not enough to satisfy many of those attending state ratifying conventions. Many of them were concerned that the federal government, using its constitutionally delegated powers, might pass laws indirectly affecting religion or other subjects previously reserved for the states. As a result, many of these ratifying conventions urged the national government to amend the Constitution as soon after ratification as possible. A few states specifically urged the inclusion of a

---

Cambridge University Press, 1964); James M. O'Neill, *Religion and Education Under the Constitution* (New York: Harper, 1949); Charles E. Rice, *The Supreme Court and Public Prayer* (New York: Fordham, 1964).

[9] Mark DeWolfe Howe, *The Garden and the Wilderness* (Chicago: University of Chicago Press, 1965), pp. 22-23; Wilbur Katz, *Religion and the American Constitutions* (Evanston, Ill.: Northwestern University Press, 1964) and "The Case for Religious Liberty," in Cogley, ed., *Religion in America*, p. 101; Lowenthal, "The Place of Religion," p. 19; O'Neill, *Religion and Education*, p. 10; Joseph Snee, "Religious Disestablishment and the Fourteenth Amendment," 1954 *Washington University Law Quarterly* 371.

bill of rights. Virginia and North Carolina proposed identical provisions dealing with religion:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.[10]

New York offered a provision similar to these,[11] while New Hampshire suggested that "Congress shall make no laws touching religion or to infringe the rights of conscience." [12]

When James Madison reworked the many amendments suggested by the states into one set of proposals to be presented to the First Congress, he revised this religion amendment and added a new one not suggested by the states that would have limited state power. The two amendments were introduced by Madison to Congress on June 7, 1789.

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.[13]

---

[10] J. Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2d ed., 5 vols. (Washington, D.C., 1836), vol. 3, p. 659 (Virginia) and vol. 4, p. 1244 (North Carolina).

[11] Ibid., vol. 1, p. 328.

[12] Ibid., vol. 1, p. 362.

[13] 1 *Annals of Congress* 434 (June 8, 1789).

> No state shall violate the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases.[14]

The language used in these amendments indicates that Madison wanted to prohibit both the states and the federal government from infringing on the rights of conscience. In contrast, the establishment clause was to apply only to the federal government.

Madison's proposed amendments were referred on June 7 to the Committee of the Whole House.[15] After they sat idle for a month and a half, they were referred on July 21 to a specially formed Select Committee, of which Madison was a member.[16]

The Select Committee acted fairly quickly, reporting to the House after one week, on July 28. The committee recommended the proposal to prohibit the states from violating the equal rights of conscience, and the House passed it after little debate and only a minor modification.[17] It also recommended an amended version of the proposal limiting congressional action, but, in contrast with the limitation on state action, this proposal was debated by the First Congress at greater length than almost any other item in the Bill of Rights.

The committee version of the limitation on congressional action, which was to be changed several times during the course of the debates over the Bill of Rights, read:

> No religion shall be established by law, nor shall the equal rights of conscience be infringed.[18]

---

[14] Ibid., p. 435.

[15] Ibid., p. 450.

[16] Ibid., p. 665.

[17] The House's rewording involved only a minor shift in grammar. 1 *Annals* 755.

[18] 1 *Annals* 729.

This committee version made two major changes from the original Madison proposal. First, the committee dropped the phrase "the Civil Rights of none shall be abridged on account of religious belief or worship." Since there was no committee report, any explanation of the meaning of this change must be conjectural. One plausible reason for the omission is that the phrase seems to be redundant, protecting nothing not covered either by Article VI of the original Constitution or by the other clauses of the proposed amendment.

The second committee change was the omission of the word "national" used in Madison's proposal, making the amendment read, "No religion shall be established by law." This change was more significant than the other one, but it would be best to defer an explanation of its meaning until the debate is analyzed.

Another two weeks passed between the July 28 filing of the Special Committee's report and the consideration of the Bill of Rights on the floor. In other words, more than two months elapsed between Madison's June 7 introduction of the amendments and the start of floor debate on August 15.

This waiting period may seem normal to a student of the modern Congress, who is used to seeing bills become lost in standing committees. But it was exceptional in the early Congresses, and, as the months wore on, the time element became an important factor in the political strategies of those interested in the amendments.

Anti-Federalists who had opposed the Constitution had used the lack of a bill of rights as an argument against ratification. Now, these same anti-Federalists hoped to stall the Bill of Rights and thus weaken support for the new Constitution. The tactic might have succeeded. There was a delay in assembling a quorum at the beginning of the First Congress and time was short.

Madison understood this tactic for what it was.[19] Once the amendments reached the floor, he acted forcefully to expedite debate and to arrange the compromises necessary to assure passage before adjournment.[20] Readers looking at the *Annals of Congress* for the first time have to bear this in mind as they read the Bill of Rights debate. Much of the character of the debate, as well as some specific features of the compromises made, derive directly from the tactical situation created by this time pressure.

The August 15 Debate

Debate on the Bill of Rights opened in the House on August 15, when the religion amendment received its principal consideration. The debate left many questions unanswered—one day was hardly sufficient for a matter as complex as religious disestablishment and toleration. But one day was more than the Congress spent on most other items in the Bill of Rights. After the pressure of time had become more obvious, the members accepted some of the clauses, including the free exercise clause, with little or no debate.

The August 15 speeches concentrated on the establishment question, bypassing the "rights of conscience" or

---

[19] James Madison, *The Writings of James Madison*, Gaillard Hunt, ed., 9 vols. (New York: Putnam, 1900-1910), vol. 5, p. 335.

[20] See, for example, Madison to Edmund Randolph, August 21, 1789, ibid., vol. 5, pp. 417-18. A similar point about the delaying tactics of the opposition was made in a letter from John Brown to William Irvine, August 17, 1789. The letter is held in the Caryl Roberts Collection of the Irvine Papers, Historical Society of Pennsylvania. Brown wrote, "the Antis, viz, Gerry, Tucker, etc., appear determined to obstruct and embarass the business as much as possible." A similar picture of Gerry and Tucker's motives appears in a letter dated August 18, 1789, from Frederick A. Muehlenberg to Benjamin A. Rush. Copies of both letters are available in the files of the First Congress Project.

"free exercise" clause almost completely.[21] Peter Sylvester, a fifty-year-old lawyer from New York who served on the Committee of Safety in 1774, opened the debate.

Sylvester's speech indicated that he was unhappy with the language in the Select Committee's version of the establishment clause. His objection, he said, was that the particular words used could lend themselves to an unintended construction. In particular, he feared that the clause "might be thought to have a tendency to abolish religion altogether." [22]

Sylvester's objection seems a strange one. Readers trying to make sense of the debates have to ask themselves how anyone ever could think that an amendment reading "no religion shall be established by law" could be dangerous for religion. Unfortunately, Sylvester never explained his reasons.

What seems likely is that Sylvester had two premises in mind as he spoke: (1) He probably was concerned that the phrase "no religion should be established by law" could be read as a prohibition of all direct or indirect governmental assistance to religion, including land grants to church shools, such as those contained in the Northwest Ordinance, or religious tax exemptions. (2) Sylvester apparently thought some form of governmental assistance to religion was essential to religion's survival. Unless these premises are assumed, it is difficult to see how Sylvester could have seen the establishment clause as a threat to religion.

---

[21] The entire debate may be found at 1 *Annals* 729-31, and is reproduced in Stokes, *Church and State*, vol. 1, pp. 541-43. Unfortunately, there seems to be some variation in the pagination of different prints of the *Annals*. In a footnote, Stokes refers to this debate as occurring on pp. 757-59, and this author has seen other numberings as well. The numbers given here seem to be the most common. Any researcher having trouble using the *Annals*, however, would be best advised to rely on dates rather than page numbers.

[22] 1 *Annals* 729.

This reading of Sylvester's statement obviously supports this author's view of the historical meaning of the establishment clause. But as convenient as it is, it involves too many assumptions to be accepted without corroboration. It is necessary, therefore, to continue reading beyond the debate's first speech.

As we continue reading, however, we discover rapidly that something said by the Massachusetts anti-Federalists leader Elbridge Gerry supports this interpretation of Sylvester's remarks. Gerry spoke after Select Committee Chairman John Vining, of Delaware, who would have reversed the order of the "rights of conscience" and "establishment" clauses as a way of showing concern for the continued existence of religion. Gerry urged the Congress to reword the amendment to read "no religious doctrine shall be established by law." [22] The effect of this would have been to prohibit the most serious form of religious establishment, the proclamation of an official credo, without prohibiting all things that might conceivably be regarded as "aids" to religion.

What did Gerry's proposal have to do with the two speeches preceding his? Gerry apparently was responding to something, rather than starting the debate anew. Gerry may have been dissatisfied with Vining's response to Sylvester's criticism of the clause. Since Gerry's alternative language would have allowed some assistance to religion, that seems to confirm our earlier reading of Sylvester.

Roger Sherman, of Connecticut, was the fourth speaker whose remarks were recorded by Lloyd. Sherman reiterated the Federalist delegated-powers argument against having any bill of rights. Sherman said that he saw no need for an amendment, since the government had no authority to pass legislation dealing with religion. Daniel Carroll, the fifth speaker, disagreed with Sherman, not

---

[22] Ibid., p. 730.

because of his understanding of the powers delegated to the federal government, but because of the need for conciliating the anti-Federalists, who wanted amendments to quiet their fears about the new government's powers.

The next speaker was James Madison. Lloyd's summary of his speech reads:

> Mr. MADISON said, he apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish *a* national religion.[24]

Madison's response to Sherman in this speech is obvious and on the surface: whether the amendment really was needed or not—he privately agreed that it was not—some states wanted it. But there is another interesting aspect of this speech. In two places Madison misquoted his own proposal, adding a word to it by saying that Congress should not establish *a* religion. The additional word is significant. If it had been in the original, Sylvester would never have objected. If the added word had been in Madison's clause, it could not have been read as a prohibition of indirect, nondiscriminatory assistance to religion. To say that Congress should not establish *a* religion differs from saying it should not assist religion as such.

Benjamin Huntington, speaking after Madison, returned to this problem of the difference between the

---

[24] Ibid. [Emphasis added.]

clause's language and the intentions of the members of Congress. Huntington said that he agreed with Madison about what people wanted the amendment to say. In a phrase similar to Sylvester's, however, he expressed concern "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion," and he "hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all." [25] That is to say, Huntington thought the amendment should not require the government to be neutral to all differences between religion and irreligion.

Madison responded by suggesting that if the word "national" were added before the word "religion"—which would return the clause to the language he presented on June 28—the questions raised by both Sylvester and Huntington would be answered. He then indicated clearly that he accepted the Sylvester-Huntington view of what the clause should be saying, by stating its most important purpose in this way:

> Madison believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.[26]

Up to this point in the debate, everyone seemed agreed on what they wanted the amendment to say. The major disagreement was over the language reported by the committee, and whether it could be misconstrued to mean something other than what was intended. All of the

---

[25] Ibid., 730-31.

[26] Ibid., p. 731.

speakers, except Sherman, agreed that the Bill of Rights should prohibit the new government from establishing a national religion. In addition, they did not want the government to have the power deliberately to favor one religion over another. But every one of them also seemed to agree that the Bill of Rights should not prevent the federal government from giving nondiscriminatory assistance to religion, as long as the assistance is incidental to the performance of a power delegated to the government. Both Sylvester and Huntington thought that the failure to extend this kind of assistance would be the equivalent of active hostility to religion. Madison, even though he privately questioned the efficacy of governmental assistance to religion, accepted the Sylvester-Huntington view throughout the First Congress debates.

A new element was added to the debate immediately after Madison's speech urging the addition of the word "national." Samuel Livermore, of New Hampshire, objected to the rewording and offered in its place the language proposed by the New Hampshire ratifying convention: "Congress shall make no laws *touching* religion, or infringing the rights of conscience."[27] This was the first statement in the debates which, if taken out of context, could conceivably be used to support the modern Supreme Court's "no aid to religion" interpretation of the establishment clause. But Livermore's silence on the agreement between Sylvester, Huntington, and Madison on indirect nondiscriminatory assistance suggests that what he wanted had little to do with the aid/no aid issue. This is confirmed by the character of the arguments used by Elbridge Gerry to support Livermore.

Gerry, speaking next, immediately connected Livermore's proposed language to Madison's use of the word "national." Gerry objected to Madison's choice of language because it implied that the Constitution created

---

[27] Ibid. [Emphasis added.]

one nation, with a national government, instead of a union of states ruled by a federal government with limited powers. He principally was concerned, in other words, with the symbolic importance of putting the word "national" in our fundamental legal document, a word which the 1787 Convention carefully left out of the original Constitution when referring to the government of the United States. Gerry's concern with the relationship between the federal and state governments, expressed here during the establishment clause debate, was a consistent theme raised by Gerry during the First Congress, as it had been during the Constitutional Convention.

The Select Committee's version of the establishment clause—with its deletion of the word "national" from Madison's original proposal—would have satisfied this objection of Gerry's, but the committee version was too ambiguous on other grounds. Gerry supported Livermore because Livermore went even further than the committee did toward satisfying Gerry's concern over the nation/state issue. Livermore's suggested prohibition of any federal law "touching" religion differed in two ways from the versions of the clause discussed until then. (1) Livermore's language apparently would have prohibited any form of federal aid to religion, including nondiscriminatory aid offered to achieve a properly delegated end. However, this would not have led to the destruction of religion that Sylvester and Huntington feared, because Livermore's language reaffirmed the power of the states to aid religion as they saw fit. (2) Indeed, state power would have been enhanced. The Federalist interpretation of "necessary and proper" was consistent with permitting federal laws to affect state establishments indirectly, as long as Congress was trying to achieve something it had the power to accomplish. Livermore would have prevented this, and thereby could have raised havoc with the powers of the new federal government. It was precisely for this reason that Gerry, ever watchful of the new government's power, supported Livermore.

Livermore and Gerry had struck a responsive chord, and Madison knew it. He spoke right after Gerry to deny that his insertion of the word "national" was meant to have any symbolic importance, and he withdrew his motion to include the word. But the damage to the Federalist position had been done, at least for that day. The Select Committee's language, which had been neutral on the nation/state issue, was defeated 31-20 by the anti-Federalist Livermore proposal.

The August 20 Reconsideration

The August 15 debate was the only one recorded on either of the religion clauses. But the conclusion of public debate did not put an end to the changes the members of the First Congress made in the wording of the amendment.

On August 20, Fisher Ames, of Massachusetts, suggested that the establishment clause should be returned to the Select Committee's version. His proposal also marked the first congressional appearance of the free exercise clause as we know it.

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.[28]

If the interpretation given here of the Livermore amendment is correct, the Ames version of the establishment clause represented a return to a compromise position on the nation/state issue: while there were no claims that United States was one "nation," neither were there any positive assurances that Congress would not do anything that touched the state religious establishments. This compromise, however, was not to be the last word on the nation/state issue.

---

[28] 1 *Annals* 766 (August 20, 1789).

Ames's addition of the free exercise clause obviously was important, but because the *Annals* do not report any speeches on the proposal, it is difficult to determine its meaning. What was the relationship between the "free exercise" and the "rights of conscience" clauses in Ames's proposal? Were they redundant? Was the phrase "free *exercise*" meant to suggest that something more than rights of conscience or belief were to be protected? If so, what did the word "exercise" mean? Since Madison did use the word "worship" in his first version of the religion clauses, did "exercise" refer to the utterance and expression of belief through worship? If so, was the idea of worship understood to be limited to traditional modes of public, congregational prayer, or were other forms of expressive activity and/or religiously motivated behavior to be protected as well? Without any legislative record it is impossible to answer these questions without referring to noncongressional contemporary sources. We shall turn to these later.

Although there was no floor debate on Ames's motion, there must have been considerable discussion of it off stage before it was introduced. The House accepted the motion of August 21, with no apparent controversy or counterproposal. On August 24, after some minor stylistic revision, the House sent the Ames's version to the Senate as its final version of the religion amendment.[29]

Senate Action

The principal Senate debate on the amendment apparently took place on September 3. We have to say "apparently" because Senate floor debates during the early Congresses were kept secret.

---

[29] 1 *Annals* 779. For receipt by the Senate, see Journal of the First Session of the Senate, p. 60 (August 25, 1789). [Hereinafter cited as 1 S. Jour.]

The Ames amendment must have provoked controversy in the Senate, since several alternative versions were suggested in its place. The votes on these seem to have been close, because competing versions were passed and then defeated again in fairly rapid order. Unfortunately, the *Senate Journal* does not even give us vote divisions; all we are told is whether a given motion passed or was defeated.

The first substitute amendment to be offered in the Senate on September 3 read as follows:

> Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience.[30]

This version dropped the free exercise clause, while it made the establishment clause completely unambiguous on the permissibility of non-discriminatory aid. It was defeated at first, but then was accepted by the Senate after reconsideration. But that did not end the matter. After the Senate rejected a motion offered on that same day to eliminate the religion amendment entirely, it then rejected two versions of the amendment that were similar to the one they had just accepted. The two defeated amendments read:

> Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.[31]

> Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.[32]

---

[30] Ibid., p. 70.

[31] Ibid.

[32] Ibid.

The parliamentary status of the version that had passed earlier in the day is left mysterious by the *Journal*. But whatever its status, the succession of amendments offered makes it clear that both the wording of the establishment clause and the very presence of the free exercise clause were being debated. The Senate ended the day by accepting most of the Ames version, after striking the seemingly redundant clause, "nor shall the equal rights of conscience be infringed." At the end of September 3, the Senate version of the amendment read:

> Congress shall make no law establishing religion, or prohibiting the free exercise thereof.[33]

This did not satisfy some senators, who wanted to spell out the particular relationships between government and religion that they considered to be establishments. On September 9, the Senate embodied these concerns in the narrowest version of the amendment we have seen so far:

> Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.[34]

This was the religion amendment that the Senate sent back to the House.

The Meaning of the Final Language

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference.[35] The *Annals* do not give the House's reasons for rejecting the Senate's version of the religion amendment, but reasons come to mind readily. Madison's understanding of the kinds of

---

[33] Ibid.

[34] Ibid., p. 77 (September 9, 1789). The Senate defeated the amendment that would have prohibited the states from infringing on the rights of conscience. Ibid., p. 72 (September 7, 1789).

[35] Ibid., pp. 77-78.

governmental activities that should be prohibited was much broader than the understanding implied by the Senate amendment. At least part of Madison's broader conception was accepted by most members of the House.

The conference committee for the Bill of Rights was a strong one, composed of Representatives James Madison (Va.), Roger Sherman (Conn.), and John Vining (Del.), chairman of the House's Select Committee, and Senators Oliver Ellsworth (Conn.), Charles Carroll (Md.), and William Paterson (N.J.).[36] The House members seem to have had their way on the religion amendment. The version that came out of the conference was essentially the Ames version with one significant alteration:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The conference committee's language was accepted by the House on September 24,[37] and by the Senate on September 25.[38]

The final wording of the amendment embodied key compromises on both the nation/state and the aid/no aid issues, compromises which were made possible by the more important underlying agreement on the need to pass a bill of rights before time pressures made passage that year impossible. The most important compromise on the aid/no aid issue involved the use of the word "establishment" without such qualifying phrases as "religious doctrine" or "articles of faith." This formulation satisfied Madison's desire to prohibit indirect forms of discriminatory religious assistance as well as the direct establishment of a national church. At the same

---

[36] Stokes, *Church and State*, vol. 1, pp. 546-47.

[37] 1 *Annals* 913 (September 24, 1789).

[38] 1 S. Jour. 88 (September 25, 1789).

time, the phrase "an establishment" seems to ensure the legality of nondiscriminatory religious aid. Had the framers prohibited "*the* establishment of religion," which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.

Thus, through the choice of "an" over "the," the conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787, which the Congress reenacted in 1789. One key clause in the Ordinance explained why Congress chose to set aside some of the federal lands in the territory for schools: "Religion, morality, and knowledge," the clause read, "being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged."[39] This clause clearly implies that schools, which were to be built on federal lands with federal assistance, were expected to promote religion as well as morality. In fact, most schools at this time were church-run sectarian schools.

The conference committee's language indicates that, in addition to the problem of nondiscriminatory aid, committee members also were deeply concerned about the nation/state issue. This concern seems to have been reflected in the specific language they choose to insert, "no law *respecting* an establishment of religion."

Most commentators assume that the word "respecting" is synonymous with "tending toward." Thus, they read the clause as if it prohibits Congress from passing any law that tends to establish a religion. These commenta-

---

[39] 1 Stat. 50, 52 (1789), Art. III.

tors are only partly right. If this were all the conferees cared about, they could have handled the matter much more directly than they did. But what the conferees—or at least the House conferees—needed was language that would serve two purposes at once. To be sure, they wanted to prohibit laws that tended to establish a religion. But they also wanted language that would satisfy the nation/state concerns of such people as Elbridge Gerry and Samuel Livermore.

The language the conferees chose does serve both parts of this dual purpose. It not only prohibits laws which "tend to" establish a religion; it also prohibits Congress from passing laws" with respect to" an establishment of religion. In other words, it prohibits Congress from passing any law that would affect the religious establishments in the states.[40] This was designed to satisfy people from states, such as Massachusetts, that did have established churches. The conference committee's version did not go as far on this point as the proposal offered in the House by Livermore and Gerry on August 15, and that may help to explain why both men finally voted against the amendment when it was accepted by the House on September 24 by a vote of 35-14.[41] But the conference version was a compromise between the Ames version of August 20 and the more anti-Federalist Livermore version. Since the Ames version originally represented a compromise between the more nationalist Madison version and the Livermore proposal, the final version apparently went more than halfway in a vain effort to win the support of the anti-Federalists.

Most scholars who have written on the establishment clause fail to see this dual purpose because they underestimate the importance of the nation/state issue for the

---

[40] Lowenthal noted the dual purpose of this language in "The Place of Religion," p. 19.

[41] 1 *Annals* 913 (September 24, 1789).

members of the First Congress. But, according to the only comprehensive study of that Congress written by a historian who used the First Congress Project's materials, federalism was *the* overriding issue throughout the Congress.[42] There should be no surprise, therefore, about its importance here.

Thus, the records available to us demonstrate that the establishment clause was meant to have two major purposes:

(1) It prohibited the federal government from giving any aid to religion if the aid in question could *tend to* establish *a* religion. This prohibition was broader than either Gerry's "no religious doctrine" or the Senate's "no religious sect or society" formulas, but it was not so broad as to forbid such forms of nondiscriminatory assistance to religion as were found in the Northwest Ordinance.

(2) At the same time, the clause prohibited Congress from tampering with the state religious establishments. This prohibition was not so broad as it would have been under Livermore's proposal but it represented a more explicit guarantee to the states than anything in Madison's original package of amendments.

There remains one more difficult problem of interpretation. The legislative history of the establishment clause shows that the framers accepted nondiscriminatory aid to religion. Yet many writers, knowing Madison wanted to prohibit even this much, have used Madison's views stated elsewhere to support a strict separationist position. If these other writers are correct about Madison (and we know he did oppose Virginia tax benefits distributed to all churches), what can explain his willingness to go along with something different in the First Congress? The answer is twofold.

---

[42] Kenneth R. Bowling, *Politics in the First Congress, 1789-1791* (University of Wisconsin: Ph.D. diss., 1968).

(1) He needed the votes to defeat Gerry's attempts during the summer of 1789 to delay the Bill of Rights, and he needed the Bill of Rights to achieve what was to him a more important goal than the exact wording of the establishment clause—public support for the new Constitution.

(2) Madison felt all along the First Amendment was unnecessary. He thought a modern extended republic would breed such a multiplicity of sects as to make establishment unlikely even without an amendment. Once amendment became politically desirable, he was willing to accept nondiscriminatory aid instead of strict separation. But the aid would be circumscribed very narrowly. It had to be given in pursuit of a legislative end specified in the Constitution, and it could not discriminate among sects. Together, these requirements would produce practical results only slightly different from the ones that would flow from his preferred notion of separation. All that would be needed was a strict enforcement of nondiscrimination. Even in Madison's day, nondiscrimination would have required one to consider Jefferson's marginally Christian deism as a religion. Today, we also would have to include Muslims, Buddhists, and other sects outside the Judaeo-Christian tradition. Thus, the compromise he agreed to would have permitted aid to private schools but not any of the practices he thought dangerous.

What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. All of them also thought religion was useful, perhaps even necessary, for teaching morality. They all thought a free republic needed citizens who had a moral education. They all thought the primary responsibility for this education lay with the states. And they

all agreed that Article I gave Congress no direct power to deal with the subject. The disagreement was over what Congress should be allowed to do pursuant to some other delegated power. Sylvester and those who agreed with him feared that religion would be hurt if Congress were not allowed to prefer religion over irreligion in otherwise valid laws. Madison, in forms outside the First Congress, thought religion would flourish best if it were left alone, in a strict policy of separation. But he saw no harm in compromising with Sylvester, so he did.[43]

---

[43] These strands have been overlooked in the current debate over establishment for reasons largely having to do with the federalism issue. Some current writers believe the Civil War and Fourteenth Amendments so transformed the nation/state issue as to make readings based on 1789 desires to accommodate the anti-Federalists irrelevant. There are two answers to this.

(1) Before one assumes that the Fourteenth Amendment prohibits any state aid to religious organizations, one should be aware that the generation that adopted it thought yet another amendment (the "Blaine Amendment") would have been needed to achieve this. The amendment was passed by the House on August 4, 1876, but fell short of the necessary two-thirds in the Senate. The version introduced in the Senate on August 14, 1876 said, in part: "No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. . . . No. . . . appropriation or loan of credit shall be made to any religious or anti-religious sect. . . . This article shall not be construed to prohibit the reading of the bible in any school or institution; and it shall not have the effect to impair the rights of property already vested." C. Moehlman, *The American Constitutions and Religion, Religious References in the Charters of the Thirteen Colonies and the Constitutions of the Forty-Eight States: A Sourcebook on Church and State in the United States* (Berne, Ind., 1938), p. 17.

(2) More important, suppose one adopts the post-1937 notion (in Palko v. Connecticut 302 U.S. 319, 58 S. Ct. 149, 82 L.ed. 288) that the concept of "ordered liberty" in the due process clause now requires the states to adhere to the establishment clause? Even so, one should not ignore the federalism portion of the original establishment clause, as the *Everson* Court did in 1947. Ignoring it affects the way one looks on the controversy over nondiscrimina-

Michael J. Malbin is resident journalist at the American Enterprise Institute and a contributing editor to *National Journal.*

ISBN 0-8447-3302-4

Library of Congress Catalog Card No. 78-18353

AEI Studies 200

© 1978 by American Enterprise Institute for Public Policy Research, Washington, D.C. Permission to quote from or to reproduce materials in this publication is granted when due acknowledgment is made.

Printed in the United States of America

---

tory aid. If one tries to read the language in the establishment clause without its federalism context, a "no-aid" reading comes almost naturally. Understanding the federalism background helps clarify why the framers used the strange wording they did in a clause meant to permit nondiscriminatory aid.

SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION

ROBERT L. CORD
Professor of Political Science, Northeastern University

Lambeth Press
New York

1982

TABLE OF CONTENTS OF EXCERPTS FROM CORD

	Book Page	App. Page
1. The Genesis of the Establishment of Religion Clause [debates of the First Congress on the Establishment Clause]	15	[30a]
2. Resurrecting Madison and Jefferson [showing the ways these men encouraged free exercise of religion and state and federal support of religion in contradiction of Leo Pfeffer's thesis]	16	[30a]
A. In Search of Mr. Madison		
Presidential prayer proclamation	34	[32a]
B. The Quest for Mr. Jefferson	36	[35a]
Kaskaskia Indian treaty benefitting the Catholic Church	38	[36a]
Funds to propagate the Gospel	42	[38a]
3. Revelations [of federal financial aid of religion in the early Constitutional period]		
A. "Civilization of the Indians": Federal Money to Support Religious Schools and Religious Teaching	62	[43a]

Chapter One

THE GENESIS OF THE ESTABLISHMENT OF RELIGION CLAUSE

* * * *

From the above documentation, I conclude that, regarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite.

Chapter Two

RESURRECTING MADISON AND JEFFERSON

* * * *

The thesis advanced in chapter one concerning a narrower interpretation of the Establishment of Religion Clause of the First Amendment has been endorsed by a number of distinguished scholars. Besides James Madison, the State ratifiers of the Federal *Constitution*, Justice Joseph Story, and Thomas Cooley in the eighteenth and nineteenth centuries, to that list can be added the names of such noted twentieth-century constitutional scholars as Edward S. Corwin and Alexander Meiklejohn.[1] Corwin's article "The Supreme Court as National

---

[1] The late Edward S. Corwin was McCormick Professor of Jurisprudence, Princeton University, until his retirement in 1946. See

School Board," draws attention to J.M. O'Neill's book *Religion and Education Under the Constitution*,[2] which Corwin calls "a devastating assault upon the *McCollum* decision"—a 1948 U.S. Supreme Court decision discussed in detail in chapter five.[3] Indeed the O'Neill book is a devastating assault not only on *McCollum* but also on the broad interpretation given to the prohibition of the Establishment of Religion Clause by all the opinions in the *Everson* "Bus Case" of 1947[4]—the first case in which the United States Supreme Court advanced a comprehensive interpretation of the Establishment Clause.[5]

The meaning of the Establishment of Religion Clause developed in chapter one has been rejected as a narrow interpretation by the Supreme Court and by many prominent scholars, but none more pre-eminent in writing about the separation of Church and State, than Professor Leo Pfeffer, who has been referred to by the monthly periodical *Church and State* as "the country's leading legal expert on church-state questions. . . ."[6]

* * * *

---

his article, "The Supreme Court as National School Board," 14 *Law and Contemporary Problems* 3 (1949). The late Alexander Meiklejohn was most noted in the fields of logic, philosophy, and his writings on the First Amendment, among which were *Free Speech and Its Relation to Self-Government* (New York: Harper and Row, 1948), and "The First Amendment is an Absolute," Philip B. Kurland, ed., *The Supreme Court Review, 1961* (Chicago: University of Chicago Press, 1961), pp. 245-266. See his article, "Educational Cooperation between Church and State," 14 *Law and Contemporary Problems* 61 (1949).

[2] (New York: Harper Brothers, 1949). O'Neill's book was more recently reprinted without change, by Da Capo Press in 1972.

[3] Corwin, *Law and Contemporary Problems*, p. 14, fn. 44.

[4] *Everson v. Bd. of Education*, 330 U.S. 1 (1947).

[5] Because it is the precedent case interpreting the Establishment Clause, the major opinions in *Everson v. Bd. of Education* will be analyzed in chap. five.

[6] *Church and State*, Vol. 30, No. 10 (October 1977), p. 10 (202). It should be noted that Professor Pfeffer has written many books

In appraising what Madison believed was constitutional in matters of Church and State *when he was President*, it should be remembered that a request from Congress, by joint resolution, asking that a Presidential Proclamation be issued concerning a day of "Thanksgiving" and "Prayer" is a legislative act that is not binding on the President. If Congress had by law created a national holiday through appropriate constitutional legislative process—either with the President's concurrence or by overriding his veto—then presidential discretion would not have been involved. But in all of Madison's Thanksgiving Proclamations this was clearly not the case. In short, Madison as President received from Congress joint resolutions requesting the proclamations declaring the days of "Thanksgiving and Prayer" and on four separate occasions issued Presidential Proclamations which were *purely discretionary* executive acts. In no instance was he compelled by law to issue them. If Madison's heart—let alone his principles—had not been in his declaration of the days of "Thanksgiving," then the very texts of his presidential proclamations indict him as a man of little or no scruples on the matter. Consider Madison's Thanksgiving Day Proclamation of March 4, 1815:

> By the President of the United States of America.
>
> A Proclamation.
>
> The Senate and House of Representatives of the United States have by a joint resolution signified their desire that a day may be recommended to be

---

on American Constitutional Law, including *The Liberties of An American* (Boston: Beacon Press, 1956); *This Honorable Court* (Boston: Beacon Press, 1965); with Anson Phelps Stokes, *Church and State in the United States* (New York: Harper and Row, 1950); *God, Caesar, and The Constitution* (Boston: Beacon Press, 1975); and *Church, State, and Freedom* (Boston: Beacon Press, 1953). Pfeffer has also actively participated in the litigation of more than one half of all the Establishment Clause cases decided by the United States Supreme Court since the *Everson* Case of 1947.

observed by the people of the United States *with religious solemnity as a day of thanksgiving and of devout acknowledgements of Almight God for His great goodness* manifested in restoring to them the blessing of peace.

No people ought to feel greater obligations *to celebrate the goodness of the Great Disposer of Events* and of the Destiny of Nations than the people of the United States. *His kind providence* originally conducted them to one of the best portions of the dwelling place allotted for the great family of the human race. *He protected and cherished them* under all the difficulties and trials to which they were exposed in their early days. *Under His fostering care* their habits, their sentiments, and their pursuits prepared them for a transition in due time to a state of independence and self-government. In the arduous struggle by which it was attained they were distinguished by multiplied tokens of *His benign interposition.* During the interval which succeeded He reared them into the strength and endowed them with the resources which have enabled them to assert their national rights and to enhance their national character in another arduous conflict, which is now so happily terminated by a peace and reconciliation with those who have been our enemies. *And to the same Divine Author of Every Good and Perfect Gift we are indebted for all those privileges and advantages, religious as well as civil, which are so richly enjoyed in this favored land.*

It is for blessings such as these, and more especially for the restoration of the blessing of peace, that I now recommend that the second Thursday in April next be set apart as a day on which the people of every religious denomination may in their solemn assemblies unite their hearts and their voices in a freewill offering *to their Heavenly Benefactor of*

their homage of thanksgiving and of their songs of praise.

Given at the city of Washington on the 4th day of March, A.D. 1815, and of the Independence of the United States the thirty-ninth.

JAMES MADISON [63]

The actions of Madison in the House of Representatives and the White House and some of his private correspondence upon leaving the Presidency, in comparison with the statements in the "Detached Memoranda," suggest that in his discussion of monopolies—the central theme of the "Memoranda" [64]—Madison out of office and as an old man regretted some of his past public actions.

Whereas Pfeffer rests his argument about chaplains in Congress and Thanksgiving Proclamations on one document written in Madison's declining years, I think that Madison should be judged on his behavior, statements, and actions *while he was a public servant in the House and in the Presidency making policy and accountable for it.* An analogous contemporary illustration should make my point. If former President Nixon, reflecting on his tenure as President, in his final years were to publish a book in which he unequivocally wrote that: "Taping conversations, without all parties being aware of the recording, is morally wrong and clearly a flagrant violation of the constitutional right of privacy," then in my judgment, it would be absurd—for any future biographer or

---

[63] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897,* Vol. I (Washington, D.C.: Bureau of National Literature and Art, 1901), pp. 560-61. Emphasis added. Madison's "Thanksgiving Proclamations" of July 9, 1812; July 23, 1813; and November 16, 1814 are republished in the Addenda and taken from the same source.

[64] Fleet, "Madison's 'Detached Memoranda'," see especially the general discussion on "Banks," pp. 548-50, and the section on "Monopolies" of various kinds, including "Ecclesiastical Endowments," beginning on p. 551.

analyst evaluating Mr. Nixon as President—to write that: "Richard Nixon believed that surreptitious tapings of conversations in the Oval Office were immoral and unconstitutional." Indeed, the "Detached Memoranda" is appropriately named, for it reflects ideas certainly "detached" from views Madison expounded in the Congress and the White House. While "foolish consistency" may indeed be "the hobgoblin of little minds," the repudiation of one's actions taken when in public power, by an elderly statesman out of power, is hardly a solid base upon which to build a convincing historical argument, much less constitutional law. Obviously the Madison of the "Detached Memorada" is not the Madison responsible for the First Amendment nor the President who issued Proclamations of days of Thanksgiving and Prayer. One cannot in good conscience and dispassionate scholarship make consistent—the inconsistent.

The Quest for Mr. Jefferson

If there is one of the Founders of the Republic who justly ranks above James Madison in the cause of religious disestablishment, it must be Thomas Jefferson. So proud was Jefferson of the victory disestablishing the Episcopal Church in Virginia that he authorized his "Virginia Statute of Religious Liberty of 1786" to be listed on his tombstone along with two other deeds for which he wanted to be remembered: "Author of the Declaration of American Independence" and "Father of the University of Virginia." [65] No mention is made that he was, among other things, the third President of the United States.

That Mr. Jefferson favored the separation of Church and State is not questioned here, but whether Pfeffer and other scholars of the "broad interpretation" of the Establishment of Religion Clause read Jefferson correctly as to

---

[65] Saul K. Padover, *The Complete Jefferson* (Freeport, N.Y.: Books for Libraries Press, 1969); p. 1300.

what he meant and subscribed to as "separation of Church and State" *is very much in dispute here.* As with Madison, it seems clear to me that the interpretation which I ascribe to the religious prohibitions of the Establishment Clause—a view which Pfeffer labels "narrow" —is more consistent with Jefferson's ideas and actions than are those who subscribe to Pfeffer's "broad" interpretive approach.

* * * *

In his "Third Annual Message," to the Senate and House of Representatives on October 17, 1803, President Jefferson indicated that the "friendly tribe of Kaskaskia Indians . . . has transferred its country to the United States, reserving only for its members what is sufficient to maintain them in an agricultural way." [69] Following this message on October 31, 1803, Jefferson asked the Senate to advise and consent to the treaty mentioned in this message: [70]

> I now lay before you the treaty mentioned in my general message at the opening of the session as having been concluded with the Kaskaskia Indians for the transfer of their country to us under *certain reservations and conditions.*[71]

Although Pfeffer has commented that "direct grants of money or property to institutions exclusively devoted to worship, *such as churches*, are rare, *and their unconstitutionality is clear,*" [72] President Jefferson asked the Senate to ratify a treaty in which one of the conditions was the use of federal money to support a Catholic priest in his priestly duties, and further to provide money to build a

---

[69] Richardson, *A Compilation of Messages*, Vol. I, p. 359.

[70] Ibid., p. 363.

[71] Ibid. Emphasis added.

[72] Pfeffer, *Church, State, and Freedom*, p. 196. Emphasis added.

church.[73] The Third Article of the treaty in part provided:

> *And whereas, The greater part of the said tribe have been baptised and received into the Catholic church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.* The stipulations made in this and the preceding article, together with the sum of five hundred and eighty dollars, which is now paid or assured to be paid for the said tribe for the purpose of procuring some necessary articles, and to relieve them from debts which they have heretofore contracted, is considered as a full and ample compensation for the relinquishment made to the United States in the first article.[74]

The Proclamation of the Ratified Treaty was issued on December 23, 1803,[75] approximately one month after Jefferson laid it before both Houses of Congress "in their legislative capacity" on November 25, 1803, presumably for the appropriation of necessary funds to execute the treaty commitments.[76]

Lest it be argued to the contrary, if Jefferson had thought the "Kaskaskia Priest-Church Treaty Provision" was unconstitutional, he could have followed other alter-

---

[73] Richard Peters, Esq., ed., *The Public Statutes at Large of the United States of America*, Vol. VII (Boston: Charles C. Little and James Brown, 1848), pp. 78-79.

[74] Ibid., p. 79. Emphasis added.

[75] Ibid., p. 78.

[76] Richardson, *A Compilation of the Messages*, Vol. I, p. 365.

natives. An unspecified lump sum of money could have been put into the Kaskaskia treaty together with another provision for an annual unspecified stipend with which the Indians could have built their church and paid their priest. Such unspecified sums and annual stipends were not uncommon and were provided for in at least two other Indian treaties made during the Jefferson Administration—one with the Wyandots and other tribes, proclaimed April 24, 1806,[77] and another with the Cherokee nation, proclaimed May 23, 1807.[78]

Furthermore, if Jefferson had had doubts about violating any part of the *Constitution*, including the First Amendment, he certainly must have been aware that under Article VI of the Federal *Constitution*, "all treaties made or which shall be made under the authority of the United States" are listed third as the "Supreme Law of the Land"—the *Constitution* itself having primacy[79]—and that consequently the treaty would be unconstitutional. The conclusion seems inescapable that Pfeffer's version of Jefferson surely would not have used his constitutional prerogatives to submit, sign, request, and spend federal monies for a treaty that hardly reflects "the principle of complete independence of religion and government."

* * * *

. . . .

After the adoption of the Federal *Constitution* in 1788 and the addition in 1791 of the First Amendment with

---

[77] Peters, *Public Statutes at Large*, Vol. VII, "Treaty with the Wyandots, etc.," 1805, Art. IV, p. 88.

[78] Ibid., "Treaty with the Cherokees," 1806, Art. II, p. 102.

[79] In *Reid v. Covert*, 354 U.S. 1 (1957), although there was no opinion of the Court, the judgment of the Court, announced by Justice Black, indicated that "[N]o agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution." Id. at 16. On this point it appears his view was not challenged by the other opinions.

its Establishment of Religion Clause, the Fourth Congress in 1796 enacted at least two "Land Statutes." . . . The second law, approved June 1, 1796 and entitled "An Act regulating *the grants of land* appropriated for Military services and for the Society of the United Brethren, for propagating the Gospel among the Heathen," was distinctly different.[93] Like the preceding Federal statute, this one detailed the lands to be granted; Section Two, however, provided, in part, that "the patents for all lands located under the authority of this act, shall be granted . . . *without requiring any fee therefor.*" [94] Section Five of the law provides that:

> And be it further enacted, That the said surveyor general be, and he is hereby, required to cause to be surveyed there several tracts of land, containing four thousand acres each, at Shoenbrun, Gnadenhutten, and Salem; being the tracts formerly set apart, by an ordinance of Congress of the third of September, one thousand seven hundred and eighty-eight, *for the society of United Brethren for propagating the gospel among the heathen*; and to issue a patent or patents for the said three tracts to the said society, in trust, for the uses and purposes in the said ordinance set forth.[95]

---

[93] Ibid., Chap. 46, pp. 490-91. Emphasis added.

[94] Ibid., p. 491. Emphasis added. In *Church, State, and Freedom*, Pfeffer is careful to point out that after the new Federal Congress reenacted the *Northwest Ordinance*, *Public Statutes at Large*, Vol. I, First Congress, Sess. I, Chap. 8, August 7, 1789, p. 50, "no tracts of land for the support of religion" were granted under the Ordinance after the *Constitution* and the First Amendment were adopted. Pfeffer, *op. cit.*, p. 121. While this may be true, Professor Pfeffer neglects to mention the new Federal statutes under discussion here which clearly document that, after the adoption of both the *Constitution* and the First Amendment, Congress did provide "land for the support of religion."

[95] *Public Statutes at Large*, Vol. I, "Acts of the Fourth Congress," Sess. I, chap. 46, p. 491. Emphasis added.

As is evident from its name, this Society was concerned with more than merely controlling and using land set aside, in trust, for the Indians who were already Christians. In addition to exercising their trust in the interest of the Christian Indians living on portions of this land, the Society used some of the resources derived from the cultivation of these lands, and land leases sold to white tenant farmers, to convert souls "from among the neighboring heathen" and to send out missionaries to proselytize.[96]

* * * *

The Seventh Congress extended the life of the Statute twice. On April 26, 1802, the new cutoff date was set at January 1, 1803.[103] On March 3, 1803, the Congress passed "An Act to revive and continue in force, an act in addition to an act intituled etc." which was to continue in force until April 1, 1804.[104] Before the April 1, 1804 deadline, however, the Eighth Congress, on March 19, 1804, extended the 1796 Law, as amended, until April 1, 1805. This, the last renewal, had a new statutory name: "An Act granting further time for locating military land warrants, and for other purposes."[105] The "other pur-

---

[96] *American State Papers*, Class II, *Indian Affairs*, Volume II, *Documents, Legislative and Executive, of the Congress of the United States*, 17th Congress, 2d. Session, Document No. 189, "Progress of the Society of United Brethren In Propagating the Gospel Among the Indians," pp. 376-77.

[103] Ibid., Vol. II, "Acts of the Seventh Congress," Sess. I, Chap. 30, pp. 155-56.

[104] Ibid., Vol. II, "Acts of the Seventh Congress," "An Act to revive and continue in force, an act in addition to an act intituled 'An Act in addition to an act regulating grants of land appropriated for Military Services and for the Society of the United Brethren for propagating the Gospel among the Heathen,' and for other purposes," Sess. II, Chap. 30, pp. 236-37.

[105] Ibid., Vol. II, "Acts of the Eighth Congress," Sess. I, Chap. 26, pp. 271-72.

poses" were in part the propagating of "the gospel among the heathen." [106] The text of the last "revival" reads:

> Chap. XXVI.—An Act granting further time for locating military land warrants, and for other purposes.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act intituled "An Act in addition to an act, intituled An act in addition to an act regulating *the grants of land appropriated for military services, and for the society of the United Brethren for propagating the gospel among the heathen,*" approved the twenty-sixth day of April, eighteen hundred and two, be, and the same *is hereby revived and continued in force,* until the first day of April, one thousand eight hundred and five: Provided, however, that the holders or proprietors of warrants or registered certificates, shall and may locate the same, only on any unlocated parts of the fifty quarter townships, and the fractional quarter townships, which had been reserved for original holders, by virtue of the fifth section of an act, intituled "An act in addition to an act, intituled An act regulating *the grants of land* appropriated for military services, and for *the society of the United Brethren for propagating the gospel among the heathen*:" And provided also, that no holder or proprietor of warrants or registered certificates, shall be permitted to locate the same by virtue of this act, unless the Secretary of War shall have made an endorsement on such warrant or registered certificate, certifying that no warrant has been issued for the same claim to military bounty land, and by virtue of the second section of the act, intituled "*An act to revive and continue in force an act in addi-*

---

[106] Ibid., p. 271.

tion to an act intituled An act in addition to an act regulating the grants of land appropriated for military services, and for the society of the United Brethren for propagating the gospel among the heathen, and for other purposes," approved the third day of March, eighteen hundred and three.

Approved, March 19, 1804.[107]

Thomas Jefferson, who was President of the United States during the terms of the Seventh and Eighth Congresses, vetoed not one of the last three extensions of this Act. Like Washington and Adams had done before him, Jefferson signed them into law. Certainly Jefferson, who did not issue Thanksgiving Day Proclamations because he thought that they conflicted with the Establishment Clause's limitations on the Federal Government, would have vetoed these Acts if he had believed that they violated the First Amendment. Pfeffer's suggestion that in "his adult life Jefferson never swerved from his devotion to the principle of complete independence of religion and government" is not borne out by historical evidence.[108] This does not mean that Jefferson violated the First Amendment by signing these Acts of Congress. These historical facts indicate that Jefferson, unlike Pfeffer, *did not see the First Amendment and the Establishment Clause requiring a "complete independence of religion and government."* To conclude otherwise is to virtually force us to imply—if not to state outright—that either Jefferson was not an "adult" when in the White House or that he not only "swerved" from his principles concerning Church and State, in these instances he completely ignored them. Just as a Jefferson without deep convictions about the relationship between government and religion is incompatible with the author of the "Virginia Statute of Religious Liberty," so is Pfeffer's view

---

[107] Ibid., pp. 271-72. Emphasis added.

[108] Pfeffer, *Church, State, and Freedom*, p. 105.

of Jefferson's principles concerning the relationship between Church and State irreconcilable with Jefferson's treaty provision to build a church and support a priest, as well as signing federal land grants being given in trust to a religious society for the purpose of preaching the Gospel to the Indians. From these instances alone, it seems irrefutable that Professor Pfeffer's Jefferson was not the third President of the United States.

* * * *

In order to illustrate the enormity of [Pfeffer's] error on this historical point, however, a few of the many official United States reports pertaining to this matter are reproduced here as documentation of my preceding statements.

* * * *